(4)

No. 96-795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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Dated: December 1996

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QUESTION PRESENTED

Is an employer prohibited from conducting a secret-ballot, non-coercive poll of its employees to determine whether a majority of them support an incumbent union unless that employer already has obtained so much evidence of lack of majority support as to render the poll superfluous?

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents

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[1] This brief *amicus curiae* is being filed with the written consent of both Petitioner and Respondent. As required by United States Supreme Court Rule 37.2, letters evidencing such consent are being simultaneously filed with the Clerk of the Court.

nearly 215,000 businesses and professional organizations and serves as the principal voice of the American business community.

An important function of the Chamber is to represent the interest of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has sought to advance those interests in this Court by filing briefs *amicus curiae* in cases of importance to the business community.[2]

In the present case, a divided panel of the Court of Appeals for the District of Columbia Circuit affirmed a National Labor Relations Board ("NLRB" or "the Board") holding, which precludes an employer from polling its employees to determine whether a majority of them support an incumbent union unless the employer already has obtained so much evidence of lack of majority support as to render the poll superfluous. This holding conflicts with the decisions of other circuits, all of which have rejected the NLRB's standard on the ground that it makes no sense. The NLRB's standard, moreover, renders it nearly impossible for an employer to challenge a union's presumption of majority employee support. The Chamber's members have a vital interest in defending their right to rebut this presumption and in clarifying this now confused area of law.

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[2] *See, e.g., Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992); *Patterson v. Shumate*, 505 U.S. 1239 (1992); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

STATEMENT OF THE CASE

Petitioner Allentown Mack Sales, Inc., ("Allentown Mack") is a company that was formed by three former managers of the Mack Truck dealership in Allentown, Pennsylvania. App. 2. On December 21, 1990, Allentown Mack purchased the dealership from Mack Trucks, Inc., and hired 32 of the dealership's 45 employees. *Id.* All of these 32 employees had been represented by a union. *Id.*

During the period leading up to, and immediately after the sale, seven employees made unequivocal statements that they no longer supported the union. One of these seven told management that the "entire night shift" (consisting of five or six employees) did not want the union. App. 2, 52. Another employee, who was a union shop steward, told management that the employees did not need a union. App. 14. Still another employee, who was a member of the union bargaining committee and the shop steward for the service department (consisting of 23 employees), also told management that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." *Id.*

Based on these employee sentiments, the new company postponed recognition of the union "until further investigation." App. 30. It then polled its employees to determine whether a majority of them supported the union. App. 44, 58. The poll was supervised by a Roman Catholic priest and was not coercive. App. 2, 58-60.

In the poll, the employees rejected the union by a 19-to-13 margin. App. 2, 14, 44. Accordingly, the company withheld recognition from the union. App. 2. The union then filed unfair labor practices charges with the Board. *Id.*

The Board held that the poll violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act"). App. 26 n. 9. Under NLRB precedent, the Board explained, an employer may not poll its employees to determine whether they support their union unless the employer has a good-faith doubt of the union's majority status. App. 25-26. To satisfy this good-faith doubt test, however, the employer must show evidence that a majority of employees expressly repudiated the union. App. 24-26. Because a majority of Allentown's employees had not individually told management that they opposed the union, the Board found that Allentown Mack lacked a good-faith doubt. *Id.* The Board further found that "because the poll itself was an unfair labor practice, [the employer] could not lawfully rely on the results of the poll in declining to recognize the [u]nion." App. 27. Accordingly, the Board held that Allentown Mack's withdrawal of recognition was also unlawful and ordered the company to bargain with the union even though a majority of employees had expressly voted against a union.

A divided panel of the Court of Appeals for the District of Columbia enforced the Board's order. The panel expressly rejected the decisions of other courts of appeals, all of which have rejected the Board's standard and instead have adopted a rule that allows an employer to poll its employees to test majority status if it has substantial, objective evidence of a loss of union support even if that evidence does not establish that an actual majority of the employees no longer support the union.

SUMMARY OF THE ARGUMENT

This case raises a distinct legal issue -- when may an employer conduct a non-coercive poll of its employees to determine whether it should no longer recognize an

incumbent union on the ground that a majority of its employees no longer desire representation by that union.

The NLRB has adopted a standard that permits a poll only when the employer already has so much other evidence of lack of majority support as to justify a withdrawal of recognition without a poll. This standard, however, makes no sense. By permitting a poll only when the employer already has so much evidence of lack of majority support as to justify a withdrawal of recognition, the Board's standard essentially permits that employer to conduct a poll only when it has no actual need to do so.

The Board's standard also lacks a statutory basis. The Board found that the poll violated Section 8(a)(1) of the NLRA, which prohibits employer interference with employees' exercise of their right to organize. All parties concede, however, that the poll was non-coercive and did not impinge on any employee right. The reasons given by the Board for holding the poll unlawful have no basis in Section 8(a)(1) of the NLRA.

The decision below has created a conflict among the federal courts of appeals. While the Court of Appeals below upheld the Board's standard, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits have explicitly rejected the rule on the ground that it does not make any sense. The Court of Appeals for the Second Circuit has also found the standard to be "problematic." This circuit split has continued despite the Board's attempt to reconsider and re-rationalize the basis for its standard.

The issues raised in this petition significantly affect important labor rights of employers and employees. A poll provides what may be the only means by which an employer can meet the strict standard necessary to warrant withdrawing recognition from a union. By precluding the employer,

particularly a new successor employer, from polling its employees unless it has already met this standard, the Board has severely restricted an employer's right to rebut the union's presumption of majority support. This anomaly has caused the Chief Justice to express "considerable doubt" about the standard and has also caused Justice Blackmun to state that he is "troubled by" the standard.

This petition thus presents a clear issue of federal labor law that was wrongly decided by the Court of Appeals, that is the subject of a circuit split and that is of vital importance to employers and employees alike. For these reasons, the petition for *certiorari* should be granted.

ARGUMENT

I. THE CASE BELOW WAS WRONGLY DECIDED.

A. The NLRB Standard, Which Permits A Poll Only When That Poll Would Be Entirely Superfluous, Makes No Sense.

This case raises an important question of federal law: when may an employer poll its employees to determine whether a majority of them support an established union. A union, it is well settled, typically enjoys an irrebuttable presumption of majority support for the year following the union's certification and for the first three years of a collective bargaining agreement. *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 777-78 (1990). At the end of the certification year or upon the expiration of the collective-bargaining agreement, however, this presumption becomes rebuttable. *Id.* An employer may then overcome the presumption by showing that either "(1) the union did not in fact enjoy majority support, or (2) the employer had a

'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778. As soon as an employer has a good-faith doubt of the union's majority support, it should withdraw recognition. *See Auciello*, 116 S. Ct. at 1754. Indeed, it is an unfair labor practice for an employer to confer exclusive representation status upon a union that enjoys only minority employee support. *See International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 736 (1961); 159 U.S.C. § 8(a)(2).

A poll is a useful method by which an employer can determine whether its employees support the union. The Board has "acknowledge[d] an employer's right to conduct such a poll" and professed a desire not to "do away with such polls." *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061 (1989), *enf'd in part*, 923 F.2d 398 (5th Cir. 1991). The Board, however, has so narrowed the circumstances under which such polling is permitted as to render polling entirely meaningless. The Board permits such polls only when the employer has a good-faith doubt, founded on a sufficient objective basis, of the union's majority support. *Texas Petrochemicals*, 296 NLRB at 1059. This is the exact same standard that the Board uses for determining whether an employer is justified in withdrawing recognition from a union. *Id.* The Board's standard, which permits the employer to poll to obtain evidence of lack of majority support only if the employer already has so much evidence of lack of support as to make the poll superfluous, is circular and quite divorced from sense or logic.

B. This NLRB Standard Lacks A Statutory Basis.

The Board based its ruling that the poll was unlawful on Section 8(a)(1) of the NLRA. This section declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 7." 29 U.S.C. § 158(a)(1). The Board, however, did not find that the poll interfered with any Section 7 right. Indeed, the Administrative Law Judge specifically found that the conduct of the poll was non-coercive and did not interfere in any way with employees' Section 7 rights.[3]

The Board's only basis for holding the poll unlawful is that the employer conducted the poll without satisfying the good-faith doubt requirement, *i.e.*, without knowing that a majority of the employees did not support the union. App. 25-26. The Board has given two reasons for this requirement. *See Texas Petrochemicals Corp.*, 296 NLRB at 1057. The primary reason is a claimed need for consistency between the standard that an employer must meet in order to obtain an NLRB-conducted secret ballot election[4] -- *i.e.*, good-faith doubt of the union's majority support -- and the standard that the employer should meet in order to conduct a poll. *Id.* at 1061-63. The secondary reason is the Board's belief that its restrictive standard fosters industrial stability.

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[3]In *Strucksnes Constr. Co.*, 165 NLRB 1062 (1967), the Board held that a poll does not interfere with employees' Section 7 rights if: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. The poll in this case satisfied this standard, App. 58, and "there is nothing in the evidence . . . to indicate that there was anything questionable or coercive about the poll." App. 60.

[4]Such an election, which is authorized by Section 9(c) of the Act, is initiated by the employer to test the union's majority support. This election is triggered by an employer "RM" petition, which, like a poll, must be supported by objective evidence of actual loss of majority status. *See Texas Petrochemicals*, 296 NLRB at 1059. Because the Board requires the same level of proof to trigger this election, it is not a viable option for an employer to seek an NLRB election instead of a poll.

Neither of these reasons has any basis in the statute. The first reason -- the claimed need for consistency between the standard for a poll and a Board election -- impermissibly conflates the Board's function as the supervisor of representation elections (Section 9 of the Act) with the Board's function in preventing and adjudicating unfair labor practices (Sections 8 and 10 of the Act). *See American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940) (discussing these two distinct functions). Section 9 authorizes the Board to set standards governing elections and to set aside those elections if those standards are not met.[5] That conduct violates an election standard, however, does not make it an unfair labor practice.[6] *See, e.g.*, Patrick Hardin, *The Developing Labor*

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[5]The Board's election standards normally are immune from judicial review. *See American Fed'n of Labor*, 308 U.S. at 401. Surely, the Board cannot claim that the polling standard in the present case, which is subject to judicial review, should be upheld merely because it is consistent with an election standard under Section 9 of the Act. Employer pre-election statements, for instance, are separately analyzed under Sections 8 and 9 of the Act and can violate the requirements of one section without violating the other. *See* Patrick Hardin, *The Developing Labor Law* 344 (3rd ed. 1992). Any alleged need for consistency not only lacks a statutory basis, but would also effectively immunize the Board from judicial review in this case and in other cases in which unfair labor practice findings are based on an alleged need for consistency with Section 9 election standards. The Board should not be permitted to avoid its adjudicatory responsibility under Section 8 simply by invoking its Section 9 rules concerning the conduct of elections.

[6]The Board's claimed need for consistency between these two standards also overlooks the significant distinctions between a poll and a Board conducted election. A poll is merely a means of determining whether there is sufficient doubt of majority support to warrant a withdrawal of recognition until such time as the union reestablishes its exclusive majority status. Following such a withdrawal, the union remains free to challenge

(continued...)

Law 98 (3rd ed. 1992) ("[A]n infringement of [one of the Board's Section 9 election standards] is not deemed an unfair labor practice but merely a basis for setting aside the election."). The second reason -- the asserted need for industrial peace -- also does not transform the non-coercive poll into an unfair labor practice. The Board cannot declare any act to be a Section 8(a)(1) violation merely because it believes that doing so would foster industrial peace. Nothing in Section 8 gives the Board such unchecked discretion and power.

In short, the Board's decision is not rational and has no basis in the Act. The panel majority therefore erred by deferring to the Board, *see Curtin Matheson*, 494 U.S. at 787, and by enforcing the Board's decision.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE UNIFORMLY REFUSED TO ENFORCE THE NLRB'S STANDARD.

The Board first applied its polling standard in *Montgomery Ward & Co.*, 210 NLRB 717 (1974). Since then, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits have explicitly rejected the rule on the ground that it does not make sense. *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) ("[W]e are not convinced that an employer may conduct an employee poll only when

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[6](...continued)
the employer's action and to obtain an NLRB election. Unlike a poll, an election is conclusive. It requires the participation of the NLRB and carries the imprimatur of the NLRB's certification and a one year irrebuttable presumption of majority status, or if the union loses the election, a statutory bar to another election for one year. There is thus a rational basis for a higher standard for triggering the formality of an NLRB election.

it has no actual need to so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition."); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982) ("We find the Board's position to be untenable [because under] the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary . . . ."); *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) ("[We disagree with the Board because by] the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so . . . ."). These circuits have instead adopted a "loss of support" rule, which permits a poll so long as the employer has "substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." *Thomas Indus.*, 687 F.2d at 867.

In light of these courts' objections, the Board reconsidered its standard in 1989. *See Texas Petrochemicals*, 296 NLRB at 1057. It decided to reaffirm its standard for the same reasons it previously cited in *Montgomery Ward*. *Texas Petrochemicals* thus did nothing to address these circuits' concern that the Board's standard did not make sense.

Since *Texas Petrochemicals*, the Courts of Appeals for the Fifth and Ninth Circuits have reaffirmed their belief that the Board's standard is incorrect. *See Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 402 (5th Cir. 1991) ("This circuit . . . feels that there is a lesser burden for an employer to justify holding a poll."); *Wagon Wheel Bowl, Inc. v. NLRB*, 47 F.3d 332, 335 (9th Cir. 1995) (the *Texas Petrochemicals* standard is not applicable in this circuit). The Court of Appeals for the Second Circuit has also expressed serious doubts concerning the *Texas Petrochemicals* standard. *See NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 571 (2d Cir. 1994). Moreover, the Chief Justice and Justice Blackmun,

respectively, have also expressed "considerable doubt" about and have been "troubled by" the *Texas Petrochemicals* standard. *See Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) and at 799 (Blackmun, J., dissenting).

In this case, the divided panel below rejected these authorities and instead upheld the Board's standard. App. 8 ("As between the decision of the three courts of appeals and the board, we believe the Board has the better of it."). Although the panel found that the Board's analysis was "[not] entirely satisfactory," it nonetheless concluded that "the only proper course [was] . . . to defer to the Board." App. 6, 8. This decision, thus, has created a circuit conflict, which alone justifies this Court's granting *certiorari*. But, this case presents more than mere circuit conflict. The question of when an employer may poll its employees raises important issues of federal law.

III. THIS PETITION RAISES IMPORTANT QUESTIONS OF FEDERAL LABOR LAW THAT SIGNIFICANTLY AFFECT VITAL INTERESTS OF EMPLOYERS AND EMPLOYEES.

A. Polling Is Important Because It "May Be The Only Effective Means" By Which An Employer Can Obtain The Evidence Necessary To Rebut The Union's Presumption Of Majority Support.

An employer whose employees have expressed a desire to repudiate their union has a right to attempt to rebut the union's presumption of majority support. *Curtin Matheson*, 494 U.S. at 778. To establish the good-faith doubt of majority support needed to overcome this presumption, the employer must show that a majority of its employees expressed a specific desire to repudiate the union. Anti-union sentiments expressed during a job interview, employee

statements of dissatisfaction with the quality of union representation, or one employee's report of other employees' union antipathy is typically insufficient. App. 10-11. Rather, under the Board's standard, the employer must show that a majority of its employees of their own accord expressed to the employer a specific desire to repudiate the union. *Id.*

The quantum of proof that the Board requires to satisfy the good-faith doubt standard is so stringent as to make it nearly impossible for an employer to rebut the presumption of continued majority status unless the employer can take a poll.[7] While some employees may actively seek out the employer in order to express a specific desire to repudiate the union, it is highly unlikely, especially among the larger

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[7]The Board continues to recognize that an employer may overcome a union's presumption of majority support by showing that either "(1) the union did not in fact enjoy majority support, or (2) the employer had a 'good-faith' doubt, founded on a sufficient objective basis, of the union's majority support." *Curtin Matheson*, 494 U.S. at 778; *Celanese Corp. of Am.*, 95 NLRB 664, 673 (1951). By defining good-faith doubt so strictly, however, the Board has effectively eliminated the distinction between good-faith doubt and knowledge in fact. *See, e.g., Phoenix Pipe & Tube*, 302 NLRB 122, 122 (finding of lack of good-faith doubt based "solely on the fact that . . . the statements of 24 employees . . . do not constitute a majority . . . ."), *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Guerdon Indus., Inc.*, 218 NLRB 658 (1975) (dissenting opinion) (burden on an employer is so heavy that it must affirmatively prove loss of majority status in fact). After all, if a majority of employees have expressed a specific desire to repudiate the union, does this not constitute knowledge in fact? Indeed, many of the Board's recent decisions have also attempted to limit employers' ability lawfully to withdraw recognition from a union. *See generally Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring) (some recent decisions suggest that the Board has made it even more difficult to satisfy the good-faith doubt requirement); *see, e.g., NLRB v. New Assocs.*, 35 F.3d 828 (3d Cir. 1994) (refusing to enforce a Board decision that held that an employee-initiated decertification petition did not raise a good-faith doubt concerning the union's majority status).

employers, that a majority of the employees will clearly express their sentiments. In such a case, polling can be "a useful and legitimate tool [for ascertaining employees' sentiments] when the employer's sincere doubt of the union's majority status is based on objective evidence which falls short of that needed to justify withdrawal of recognition." *A.W. Thompson*, 651 F.2d at 1145.

The employer's dilemma is made even more difficult by the fact that the Board applies a case-by-case analysis to determine whether there is "sufficient objective basis" to establish good-faith doubt. As a result, the definition of a sufficient objective basis is shifting and difficult to predict with certainty. This case is a perfect example. The NLRB's and ALJ's decisions are full of speculation as to why employees' comments might not indicate loss of support. App. 23-24, 45-56. Permitting a non-coercive poll would provide predictability and reduce drawn-out litigation concerning whether there was a sufficient objective basis to support a good-faith doubt.

The Chief Justice and Justice Blackmun have recognized that the Board's polling standard has severely limited the legitimate means by which an employer might satisfy, with predictability, the good-faith doubt requirement. In *Curtin Matheson*, the Chief Justice expressed "considerable doubt whether the board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments[, i.e., a poll.]" 494 U.S. at 797 (Rehnquist, C.J., concurring). Justice Blackmun was similarly troubled by the Board's policy, which "appears to require that good-faith doubt be established by express avowals of individual employees [but by prohibiting a poll] make[s] it practically impossible for the employer to amass direct evidence of its

workers' views." *Id.* at 799 (Blackmun, J., dissenting). The Board cannot define good-faith doubt so strictly that it effectively requires proof while simultaneously prohibiting employers from using a poll, which may be the only effective means of obtaining this proof.

B. Having An Effective Means To Determine Employees' Sentiments Regarding A Union Is Especially Important In Light Of The Limited Time That An Employer Has In Which To Ascertain These Sentiments.

An employer whose employees have expressed a desire to repudiate the union must investigate their sentiments in a timely manner. *See Auciello Iron Works*, 116 S. Ct. at 1754. Just last term, this Court emphasized that once the employer and the union agree to a collective-bargaining agreement, the presumption becomes irrebuttable for up to three years. *Id.* But by forbidding a poll, the Board has made it exceedingly difficult for an employer to establish a good-faith doubt in the limited time available to it. If the Board is going to insist that an employer challenge the union's majority presumption only during contract negotiation periods, then non-coercive polling must be permitted so that an employer that has substantial, objective evidence of a loss of union support, but whose evidence is insufficient to justify a withdrawal of recognition or trigger a Board election, can take steps to determine whether the union has in fact lost majority support.

C. A Realistic Opportunity To Rebut The Presumption Is Especially Important In Cases Such As This One That Concern A Successor Employer.

Although a successor employer, such as Allentown Mack, is bound by the incumbent union's presumption of majority support, the successor employer has a right to attempt to

rebut this presumption. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Harley-Davidson Transp. Co.*, 273 NLRB 1531, 1531 (1985). This opportunity is especially important to successor employers because the new company's employees may feel differently toward the new employer and because the company's workforce may have changed. This case presents a perfect example. While the old employer is a large multi-national company, Allentown Mack is a small, locally-owned enterprise that only employed about two-thirds of the former employer's employees. App. 2. Judge Sentelle, in dissent, thus correctly observed that in cases such as this one the presumption of majority support is weaker and the need for a poll is greater. App. 18.

A successor employer is also often new on the scene. It has not been a party to past collective-bargaining agreements with the union and is in a difficult position precisely because of that lack of knowledge and experience. Under *Auciello*, moreover, this new employer has only a short time to ascertain its employees' sentiments regarding the union. Delay or instability at this point could damage the nascent relationship between the new employer and its employees and could undermine employee moral. For the new employer in particular, a poll may provide the only practicable option for determining employee sentiments. Thus, the petition should also be granted because it raises important questions of federal labor law that significantly affects vital employer and employee rights.

CONCLUSION

For all the reasons stated herein and in the petition for *certiorari*, the petition should be granted.

Respectfully submitted,

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Dated: December 1996.